

OCT 21 2003

BC

Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

-----X  
IN RE ENRON CORPORATION  
SECURITIES, DERIVATIVE &  
"ERISA" LITIGATION

MDL-1446

-----X  
This Document Relates To:  
MARK NEWBY, ET AL.,  
PLAINTIFFS,

VS.

CIVIL ACTION NO. H-01-3624  
CONSOLIDATED CASES

ENRON CORPORATION, ET AL.,  
DEFENDANTS.

-----X  
SAMSON INVESTMENT COMPANY,  
PLAINTIFF,

VS.

CIVIL ACTION NO. H-03-2264

ARTHUR ANDERSEN L.L.P.,  
DEFENDANT.

AND

ARTHUR ANDERSEN L.L.P.,  
DEFENDANT/THIRD-PARTY  
PLAINTIFF,

VS.

ANDREW FASTOW, ET AL.,  
THIRD-PARTY  
DEFENDANTS

-----X  
[Caption continued on following page.]

NOTICE OF SUPPLEMENTAL AUTHORITY  
IN SUPPORT OF BANK DEFENDANTS' SUPPLEMENTAL  
RESPONSE TO PLAINTIFFS' MOTIONS TO REMAND AND DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND (H-03-3393)

U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS  
2003 OCT 21 PM 4:55

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-----X :  
RICHARD CHOUCROUN, ET AL., :  
PLAINTIFFS, :  
VS. :  
ARTHUR ANDERSEN L.L.P., ET AL., :  
DEFENDANTS. :  
AND :  
ARTHUR ANDERSEN L.L.P., :  
DEFENDANT/THIRD-PARTY :  
PLAINTIFF, :  
VS. :  
JP MORGAN CHASE & CO. ET AL., :  
THIRD-PARTY :  
DEFENDANTS. :  
-----X :

CIVIL ACTION NO. H-03-3320

-----X :  
AL RAJHI INVESTMENT CORPORATION :  
BV, :  
PLAINTIFF, :  
VS. :  
ARTHUR ANDERSEN L.L.P., :  
DEFENDANT. :  
AND :  
ARTHUR ANDERSEN L.L.P., :  
DEFENDANT/THIRD-PARTY :  
PLAINTIFF :  
VS. :  
JP MORGAN CHASE & CO., ET AL., :  
THIRD-PARTY :  
DEFENDANTS. :  
-----X :

CIVIL ACTION NO. H-03-1219

-----X :  
CALIFORNIA PUBLIC :  
EMPLOYEES' RETIREMENT :  
SYSTEM, :  
PLAINTIFF, :  
VS. :  
BANC OF AMERICA :  
SECURITIES LLC, ET AL., :  
DEFENDANTS. :  
-----X :

CIVIL ACTION NO. H-03-3481

-----X	:	
<b>PAUL OKOMO,</b>	:	
<b>PLAINTIFF,</b>	:	
<b>VS.</b>	:	<b>CIVIL ACTION NO. H-03-3508</b>
	:	
<b>BANC OF AMERICA</b>	:	
<b>SECURITIES LLC, ET AL.,</b>	:	
<b>DEFENDANTS.</b>	:	
-----X	:	
<b>RETIREMENT SYSTEMS</b>	:	
<b>OF ALABAMA, ET AL.,</b>	:	
<b>PLAINTIFFS,</b>	:	
<b>VS.</b>	:	<b>CIVIL ACTION NO. H-03-2308</b>
	:	
<b>MERRILL LYNCH &amp; CO., ET AL.,</b>	:	
<b>DEFENDANTS.</b>	:	
-----X	:	
<b>DK ACQUISITION PARTNERS, L.P., ET AL.,</b>	:	
<b>PLAINTIFFS,</b>	:	
<b>VS.</b>	:	<b>CIVIL ACTION NO. H-03-3393</b>
	:	
<b>J.P. MORGAN CHASE &amp; CO., ET AL.,</b>	:	
<b>DEFENDANTS.</b>	:	
-----X	:	

Defendants J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., JPMorgan Chase Bank, Citigroup Inc., Citibank N.A., Salomon Smith Barney Inc., Salomon Brothers International, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston Inc., Pershing LLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., fka CIBC Oppenheimer Corp., Bank of America Corporation, Banc of America Securities LLC, Bank of America, N.A., Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Deutsche Bank AG, Goldman, Sachs & Co., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Inc., and Lehman Brothers Holdings Inc. (collectively, “Bank Defendants”) respectfully submit this notice of supplemental authority in connection with (1) the

Bank Defendants' Supplemental Response to Plaintiffs' Motion to Remand Concerning the Effect of the Court's September 15, 2003 Decision in *American National et al. v. Arthur Andersen, et. al.* (filed October 8, 2003) (the "Supplemental Response") and (2) Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Remand (filed October 14, 2003) in H-03-3393.

The Bank Defendants submit this notice to bring to the Court's attention the October 14, 2003 decision by the U.S. Court of Appeals for the Ninth Circuit in *Kelton Arms Condo. Owner's Ass'n, Inc. v. Homestead Ins. Co.*, Case No. CV-02-02587, slip op. 15033, 15033-38 (9th Cir. Oct. 14, 2003) (opinion attached hereto as Exh. A). Citing, among other authority, the Fifth Circuit's decision in *In re Allstate Ins.*, 8 F.3d 219 (5th Cir. 1993), the Ninth Circuit concluded that a district court has "no authority to remand a case *sua sponte* for procedural defects." *Kelton Arms*, slip op. at 15037. Indeed, "[r]ecognizing that every other circuit" including the Fifth Circuit, has reached the conclusion that a district court has no such authority, the Ninth Circuit held that a "district court cannot remand *sua sponte* for defects in removal procedure." *Id.* at 15037-38.<sup>1</sup> The Ninth Circuit observed that *sua sponte* remands on the basis of procedural defects are not permitted given the "sound" reasoning that "procedural requirements . . . can be waived." *Id.* at 15037.

*Kelton Arms* provides additional authority to deny Plaintiffs' remand motions in *Al Rajhi v. Arthur Andersen*, Case No. H-03-1219 (S.D. Tex.), *CalPERS v. Banc of American Securities LLC*, H-03-3481 (S.D. Tex.), *Okomo v. Banc of America Securities*, H-03-3508 (S.D. Tex.), *Samson Investment Co. v. Arthur Andersen LLP v. J.P. Morgan Chase & Co.*, H-03-2264

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<sup>1</sup> The Second Circuit likewise has held that a district court lacks authority under § 1447(c) to remand an action *sua sponte* on the basis of procedural defects over 30 days after the notice of removal has been filed. *Hamilton v. Aetna Life & Cas. Co.*, 5 F.3d 642, 644 (2d Cir. 1993).

(S.D. Tex.) and *DK Acquisition Partners, L.P. v. J.P. Morgan Chase & Co.*, Case No. H-03-3393 (S.D. Tex.).<sup>2</sup> In each of those actions, Plaintiffs waived any non-jurisdictional defects of removal by failing to raise objections thereto.

The Bank Defendants respectfully submit this additional authority, which is attached hereto as Exhibit A.

Dated: October 21, 2003

Respectfully submitted,

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<sup>2</sup> On the basis of additional arguments fully discussed in the Supplemental Response and Defendants' Opposition to Plaintiffs' Motion for Remand (H-03-3393), the Bank Defendants respectfully submit that plaintiffs' motions to remand in all of the above-captioned cases should also be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 21st day of October, 2003.

/s/ Richard Warren Mithoff  
Richard Warren Mithoff



**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

KELTON ARMS CONDOMINIUM OWNERS ASSOCIATION, INC., <i>Plaintiff-Appellee,</i> v. HOMESTEAD INSURANCE COMPANY, <i>Defendant-Appellant.</i>
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No. 02-55724  
D.C. No.  
CV-02-02587-TJH  
OPINION

Appeal from the United States District Court  
for the Central District of California  
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted  
May 8, 2003—Pasadena, California

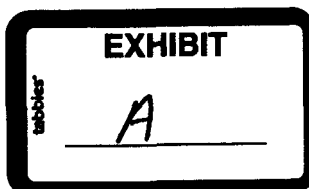
Filed October 14, 2003

Before: Betty B. Fletcher, Barry G. Silverman,  
Circuit Judges, and Frederick J. Martone, District Judge.\*

Opinion by Judge Martone

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\*The Honorable Frederick J. Martone, United States District Judge for the District of Arizona, sitting by designation.



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Matthew S. Shorr, Hunt, Ortmann, Blasco, Palffy & Rossell, Inc., Pasadena, California, for the plaintiff-appellee.

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**OPINION**

MARTONE, District Judge:

We are asked to decide whether the federal removal statute, 28 U.S.C. § 1447(c), allows the district court to remand a case

*sua sponte* for a non-jurisdictional defect in procedure. We hold that it does not.

## I.

Kelton Arms Condominium Association, Inc. (Kelton), filed an action on December 28, 2001, in the Superior Court of California against Homestead Insurance (Homestead), alleging breach of contract and bad faith. Kelton served its complaint on Homestead on March 8, 2002. Homestead removed the case on March 28th. Homestead did not identify the service date in the removal papers.

The district court remanded the case *sua sponte* on April 4th, stating only that the case had been “improperly removed.” Homestead filed a motion to reconsider asking the district court to state the basis of its order. It suspected that the district court might have remanded based upon abstention. Homestead later supplemented its motion, fearing that the district court might have remanded because it erroneously believed that removal was untimely under 28 U.S.C. § 1446(b). Homestead submitted a declaration stating that service had been made on March 8th, and therefore removal was timely under section 1446(b). The motion to reconsider was denied without comment.

## II.

We first address our jurisdiction to review the remand order. Other than one exception not applicable here, 28 U.S.C. § 1447(d) states that a remand order “is not reviewable on appeal or otherwise.” Despite this broad prohibition, the United States Supreme Court has held that section 1447(d) must be read together with section 1447(c). *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), *abrogated on other grounds in Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Section 1447(d) precludes review only of remands made pursuant to section 1447(c). *Id.* at 346.

Thus, if the district court lacked authority to remand under section 1447(c), section 1447(d) would not preclude review. If, on the other hand, the district court had the power to remand *sua sponte* under section 1447(c), section 1447(d) would apply, and we would have no jurisdiction to review even if the remand was erroneous.

Thus, the question of jurisdiction is tied to the merits. This is one of those rare cases in which we must decide the merits to decide jurisdiction. We, of course, have jurisdiction to decide jurisdiction.

### III.

We turn to the issue of whether the district court had the authority to remand a case *sua sponte* for a non-jurisdictional procedural defect under section 1447(c). The full text of section 1447(c) provides:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

[1] In *Maniar v. FDIC*, 979 F.2d 782, 786 (9th Cir. 1992) we held that the thirty day limit applied to *sua sponte* remands, but we specifically “assum[ed] without deciding that a district court may remand *sua sponte* for procedural defects in a removal.” *Id.* We did not decide the question of whether

the district courts may remand *sua sponte* because we did not have to — the court remanded more than thirty days after removal. Since then, five other circuits have addressed the question. Each has held that the district courts have no authority to remand a case *sua sponte* for procedural defects. *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001); *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445 (3d Cir. 2000); *Page v. City of Southfield*, 45 F.3d 128 (6th Cir. 1995); *In re Cont'l. Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins.*, 8 F.3d 219 (5th Cir. 1993). We recognize that procedural rules are best applied uniformly, and we decline to create a circuit split unless there is a compelling reason to do so. *Maniar*, 979 F.2d at 785. Here, there is no reason to do so that is not outweighed by the sound considerations noted by the other circuits.

The first sentence of section 1447(c) “consigns procedural formalities to the care of the parties.” *In re Allstate*, 8 F.3d at 223. The second sentence “assigns to the court concern for its jurisdictional prerequisites.” *Id.*; see also *Page*, 45 F.3d at 133. This division makes sense. Subject matter jurisdiction may not be waived, and, indeed, we have held that the district court must remand if it lacks jurisdiction. See *Sparta Surgical Corp. v. Nat’l Ass’n. Sec. Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998).

In contrast, procedural requirements exist primarily for the protection of the parties. Like personal jurisdiction, they can be waived. *Whole Health*, 254 F.3d at 1321; *Page*, 45 F.3d at 134; *Cont’l. Cas.*, 29 F.3d at 294. A plaintiff may wish to remain in federal court even though he or she originally filed in state court. For example, a plaintiff might do this simply to expedite the litigation.

Our holding also decreases the likelihood of unreviewable error. This case illustrates the problem. The district court gave no specific reason for its decision and remanded the case without notice to the parties. Because Homestead failed to

identify the date of service in its removal papers, the district court likely assumed that removal was untimely and therefore procedurally defective. *See Maniar*, 979 F.2d at 785 (untimely removal is a procedural defect). Yet not even Kelton argues that Homestead's removal was actually untimely.

#### IV.

[2] Recognizing that every other circuit has concluded that the district court has no such authority, and that there are good and sufficient reasons to reach this conclusion, we hold that the district court cannot remand *sua sponte* for defects in removal procedure. We further hold that because the district court lacked authority to remand *sua sponte* under section 1447(c), section 1447(d) interposes no jurisdictional barrier to review. The district court's remand order is VACATED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

VACATED and REMANDED